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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-446

LOCAL 300, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, an unincorporated association; MANUEL RENTERIA and CARLOS ENRIQUEZ,

Petitioners,

vs.

ALFRED P. MAGALLANES and ANTONIO E. OLEA, in behalf of themselves and all others similarly situated,

Respondents.

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# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NEIL M. HERRING of
FINKEL AND HERRING
A Law Corporation

3440 Wilshire Blvd.
Suite 608
Los Angeles, CA 90010
(213) 380-6707

Attorneys for Respondents

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Attorneys for Respondents

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# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

COME NOW Respondents ALFRED P. MAGALLANES and ANTONIO E. OLEA, in behalf of themselves and all others similarly situated, and respectfully present this brief to the Court (pursuant to the November 27, 1974 request of the Clerk of the Court), in opposition to the Petition for a Writ of Certiorari filed by Petitioners herein.

## QUESTIONS PRESENTED

1. Is a labor organization's promise, contained in a written collective bargaining contract, to operate its exclusive hiring halls "on a non-discriminatory basis", enforceable by civil suit in the California courts, brought by members/ discriminates pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185 -- although such hiring hall discrimination may also arguably constitute an unfair labor practice under 29 U.S.C. §§158(b)(1)(A) and/or 158(b)(2)?

2. Is a labor organization's breach of the duty of fair representation, consisting of systematic hiring hall discrimination against dissident members, actionable in the California courts -- although such hiring hall discrimination may also arguably constitute an unfair labor practice under 29 U.S.C. §158(b)(1)(A)?

## STATEMENT OF THE CASE

This is a class action for damages, compensatory and punitive, against Petitioner Local 300, Laborers International Union of North America, and certain officers of that labor organization. Respondents, for themselves and as representatives of an entire class of Local 300 members who have been discriminatorily denied employment, seek damages (a) for breach of a written collective bargaining agreement, under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. §185 [First Cause of Action, Complaint, R. 1-6], and (b) for breach of Petitioner Union's "duty of fair representation", brought under federal (common) law [Second Cause of Action, Complaint, R. 6-7].

Petitioners demurred to Respondents' entire Complaint, on the ground, inter alia, that the California courts lack jurisdiction of the subject matter, assertedly because the National Labor Relations Board has exclusive jurisdiction over Respondents' causes of action [R. 11-15, 26]. The California Superior

Court (at Los Angeles) sustained Petitioners' demurrer upon that ground on April 12, 1973, without leave to amend; and dismissed Respondents' Complaint in its entirety [R. 68-70].

On appeal from said dismissal by Respondents, the Court of Appeal of the State of California, Second Appellate District, reversed, on July 22, 1974, holding that both Respondents' Section 301 cause of action and their "duty of fair representation" cause of action are cognizable in the state courts, 40 Cal. App.3d 809 (1974). Petitioners sought review of the judgment of the California Court of Appeal, but the California Supreme Court denied their petition for hearing on September 19, 1974.

## STATEMENT OF FACTS

Petitioner Laborers Local 300 is a party to a written collective bargaining agreement with certain construction contractors, covering the terms and conditions of employment of Respondents and other members, styled "Laborers' Short-Form Agreement, Eleven Southern Counties

of California, 1970-1974" [R. 3]. That labor agreement provides, inter alia, that the hiring halls operated by Petitioners shall dispatch workers to fill construction contractors' needs

> "on a nondiscriminatory basis and shall not be based on, or in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies or requirements. . . ."
> [R. 4] [Emphasis added]

In addition to the obligation expressly imposed upon it by the written collective bargaining agreement, Petitioner Union, as the statutory exclusive collective bargaining representative of its members, owed Respondents and all other Local 300 members a "duty of fair representation" -- i.e., a duty to refrain from arbitrarily and invidiously discriminating against Respondents in selecting applicants for dispatch to jobs through the hiring halls established pursuant to said collective agreement [R. 6-7].

In breach of its own express promise in the written collective bargaining agreement, and in breach of its duty of fair representation to Respondents, Petitioner Local 300 has discriminatorily and invidiously refused to dispatch Respondents (and other discriminatees whom they represent) to construction employment through its hiring halls, because of Respondents' political opposition to the policies of the incumbent administration of Petitioner Union [R. 7]. By such discriminatory operation of its hiring halls, Petitioner Union has caused Respondents and numerous other members to suffer grave economic losses and other damages [R. 5-6].

## REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate that the California Court of Appeal, in the judgment attacked by Petitioners herein, either

> "decided a federal question of substance not theretofore determined by this [C]ourt, or . . . decided it in a way probably not

in accord with applicable decisions of this [C]ourt."

--Supreme Court Rule 19(1)(a)

On the contrary, the unanimous decision of the California Court of Appeal, as reflected in the California Supreme Court's summary denial of further review herein, thoughtfully and correctly analyzed the applicable decisions of this Court, and determined that state courts have concurrent jurisdiction over Respondents' (a) Section 301 [Arnold v. Carpenters District Council, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974); Motorcoach Employees v. Lockridge, 403 U.S. 274, 297-299 (1971); Smith v. Evening News Association, 371 U.S. 195, 9 L.Ed.2d 246 (1962); McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal.2d 45, 63 (1957)] and (b) "duty of fair representation" [Motorcoach Employees v. Lockridge, 403 U.S. 274 (1971); Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967); Humphrey v. Moore, 375 U.S. 335, 11 L.Ed.2d 370 (1964)] causes of action.

## ARGUMENT

### A. SECTION 301 [29 U.S.C. §185] ITSELF CONFERS JURISDICTION UPON THE CALIFORNIA COURTS OVER SUITS AGAINST UNIONS FOR BREACH OF THEIR COLLECTIVE BARGAINING CONTRACTS

Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. §185, first enacted by Congress in 1959, provides in pertinent part as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce . . . shall be bound by the acts of its agents. Any such labor

> organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ."

Following the passage of Section 301, Smith v. Evening News Association, 371 U.S. 195, 9 L.Ed.2d 246 (1962), held that suits to enforce a collective bargaining agreement could be brought in state or federal courts under Section 301, notwithstanding the fact that the conduct alleged would also constitute an unfair labor practice. Thus, courts handling Smith-type actions, such as Respondents' first cause of action herein, are dealing in contract rights, not unfair labor practices. This Court expressly rejected the Garmon[1/] doctrine in the context of such suits, holding that, while N.L.R.B. jurisdiction over unfair labor practices was not displaced when the conduct also allegedly violated the terms of the contract, neither was the Board's jurisdiction exclusive. See, also, Sovern,

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1/ San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

Section 301 and the Primary Judisdiction of the N.L.R.B., 76 Harv.L.Rev. 529 (1963). This approach was consistent with the express intent of Congress that enforcement of collective bargaining agreements be "left to the usual processes of the law", rather than to the Board. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511, 7 L.Ed.2d 483, 489 (1962).

And in Local 174 v. Lucas Flour Co., 369 U.S. 95, 7 L.Ed.2d 593 (1962), this Court ruled that state courts had subject matter jurisdiction over actions brought under Section 301, and must apply the principles of federal labor law to such cases.[2/]

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2/ The post-Garmon case upon which Petitioners rely most heavily [Petitioners' Brief, at pages 8, 10, 12, 13, 18, 27, 28 and 31], Association of Journeymen v. Borden, 373 U.S. 690, 10 L.Ed.2d 638 (1963), lends no support to Petitioners' position, for therein the Court expressly stated:

> "We do not deal here with suits brought in state courts under Section 301 . . . of the Labor-Management Relations Act . . ., which are governed by federal law and to which different principles are applicable. See, e.g., Smith v. Evening News Association, 371

(Cont.)

In 1964, this Court decided Humphrey v. Moore, 375 U.S. 335, 11 L.Ed.2d 370 (1964), in which plaintiffs had asserted causes of action for (a) breach of the seniority rights provisions of the collective bargaining agreement, and (b) violation of the duty of fair representation by their union.[3/] The Court held that Section 301 will support, regardless of

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2/ Cont.

U.S. 195. . . ."

-- 373 U.S. at 693, 10 L.Ed.2d at 641, n.3 [emphasis added]

3/ Under the judicially developed doctrine of "fair representation", the exclusive collective bargaining agent's statutory authority to represent all members of a designated unit includes an obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957); Steele v. Louisville and National Railroad Co., 323 U.S. 192, 89 L.Ed. 173 (1944). The California state courts pioneered the rationale for this doctrine. James v. Marinship Corp., 25 Cal.2d 721 (1944); Williams v. International Brotherhood of Boilermakers, 27 Cal.2d 586 (1946).

otherwise applicable preemption considerations, a suit in the state courts by a union member against his union that seeks to redress union interference with rights conferred on individual employees by the collective bargaining agreement, where it is proved that such interference constituted a breach of the duty of fair representation. And again in Vaca v. Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967), this Court refused to apply the preemption doctrine to suits charging a breach of the union's duty of fair representation, even though the N.L.R.B. had held that such a breach was also an unfair labor practice (in Miranda Fuel Co., 140 NLRB 181 (1962)). In Sipes, the Court emphasized that the Garmon rule was "not applicable to cases involving alleged breaches of the union's duty of fair representation", 386 U.S. at 181, 17 L.Ed.2d at 852, and that in this type of case Congress did not intend "to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative", 386 U.S. at 183, 17 L.Ed.2d at 853.

Petitioners' flat assertion [Petitioners' Brief, pp. 34-35] that Section 301 -- despite its express wording[4/] -- does not authorize suits by members (such as Respondents herein) against their unions has been definitively contradicted by the highest federal court in California, the Ninth Circuit Court of Appeals. In Buzzard v. Local Lodge 1040, International Association of Machinists and Aerospace Workers, 480 F.2d 35 (9th Cir. 1973), plaintiff union members sued their labor organization for injunctive relief and damages arising out of alleged breach of a collective bargaining agreement by their union. The Court of Appeals found that:

> "The district court did have jurisdiction . . . over plaintiffs' suits. Under Section 301 of the Labor-Management Relations Act of 1947, an employee may sue his

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4/ "Any such labor organization may . . . be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ." Section 301(b), 29 U.S.C. §185(b).

employer for breach of a promise embedded in the collective bargaining agreement that was intended to confer a benefit upon the individual. Smith v. Evening News Association, 371 U.S. 195, 9 L.Ed.2d 246 (1962). Section 301 also will support a suit by a union member against his union seeking redress from union interference with rights conferred on employees by employer promises in the collective bargaining agreement provided that such interference constituted a breach of the duty of fair representation. Humphrey v. Moore, 375 U.S. 335, 11 L.Ed.2d 370 (1964); see also Ford Motor Co. v. Huffman, 345 U.S. 330, 97 L.Ed. 1048 (1953); Falsetti v. Local 2026, U.M.W., 355 F.2d 658 (3d Cir. 1966).

Fair representation is a statutory duty of the union to represent fairly all its members, both in the conduct of collective bargaining and in the enforcement of the resulting collective

bargaining agreement. [Citations omitted] . . .

While we have been unable to find any case for the proposition that Section 301 will support a suit by a union member against his union for redress from union refusal to honor rights conferred on employees by Union promises in the collective bargaining agreement, we are convinced that Section 301 does confer such jurisdiction. The union's duty of fair representation is equally violated when it refuses arbitrarily and in bad faith to honor its obligations, under a collective bargaining agreement, which are designed to benefit its members.

Of course, for such a claim to succeed, there must be 'substantial evidence of fraud, deceitful action, or dishonest conduct' on the part of the union. Motorcoach Employees v. Lockridge, 403 U.S. at 299; Humphrey v. Moore,

375 U.S. at 348. It is clear that under this standard, plaintiffs' complaint conferred jurisdiction on the district court."

-- 480 F.2d at 40 [emphasis in original]

So in the instant case, Respondents' action for breach of Petitioner Union's own contractual promise[5/] to operate its hiring halls on a nondiscriminatory basis -- a promise obviously intended for the benefit of the union members seeking employment through those hiring halls -- is clearly cognizable in the California state courts, at the instance of the members whom such promises are intended to benefit.[6/]

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5/ The National Labor Relations Board has repeatedly held that it has no jurisdiction to enforce either employer or union promises in collective agreements. See, e.g., Coppus Engineering Corp., 195 NLRB No. 113, 79 LRRM 1449 (1972); Kayser-Roth Hosiery Co., Inc., 187 NLRB No. 76, 76 LRRM 1231 (1970).

6/ Cf. Local 1219 v. Brotherhood of Carpenters, 493 F.2d 93, 85 LRRM 2933 (1st Cir. 1974); Consolidated Theatres v. Theatrical Stage Employees Union Local 16, 69 Cal.2d 713, 447 P.2d 325 (1968); (Cont.)

B. THIS COURT HAS EXPRESSLY RULED THAT FEDERAL AND STATE COURTS' JURISDICTION OVER RESPONDENTS' CAUSES OF ACTION IS NOT "PRE-EMPTED" BY ANY SIMULTANEOUS NATIONAL LABOR RELATIONS BOARD JURISDICTION

In Machinists v. Gonzales, 356 U.S. 617, 2 L.Ed.2d 1018 (1958) -- in an opinion written only one term prior to Garmon, by the author of Garmon, and which was approvingly cited in the Garmon opinion itself -- this Court held that a (California) state court was not deprived by the Taft-Hartley Act of jurisdiction over an expelled union member's suit for restoration of his membership and for damages due to his illegal expulsion. The Court added that even though the union's acts might constitute an unfair labor practice under Section 8(b)(2) [29 U.S.C. §158(b)(2)], and even though the N.L.R.B. might award backpay, it could not award damages

6/ Cont.

Retail Clerks Union Local 770 v. Thriftimart, Inc., 59 Cal.2d 421, 380 P.2d 652 (1963); McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322 (1957).

for mental or physical suffering as the state court had.

In Vaca v. Sipes, supra, this Court again emphasized that the Garmon rule did not preclude state court jurisdiction over "duty of fair representation" cases. Although one reason for this result was that the duty of fair representation had been for the most part developed by the judiciary, rather than by the Board, the other reason was concern over the possibility of denying a hearing to an employee who felt his individual interests had been unfairly subordinated by the union. The Court expressed fear that, were preemption the rule,

> "the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."
>
> -- 386 U.S. at 182, 17 L.Ed.2d at 853.

In this Court's most recent and definitive pronouncement on the subject, Motorcoach Employees v. Lockridge, 403 U.S. 274, 29 L.Ed.2d 473 (1971), the Court expressly ruled that a union member discriminatorily denied employment by his union could maintain an action for damages (a) under Section 301, and (b) for breach of the duty of fair representation -- despite the fact that the subject matter of such suits may "arguably" resemble unfair labor practices defined by the Labor-Management Relations Act.

In Lockridge, the plaintiff member obtained a damages judgment against his union from the Idaho courts on the thesis that, in procuring Lockridge's discharge from employment pursuant to a valid union security clause in the applicable collective bargaining agreement, the defendant union had breached a contractual obligation to him embodied in the union's constitution and bylaws. The state court judgment, restoring Lockridge to union membership and awarding $32,000.00 as compensation for wages lost due to his dismissal from employment at the union's

instance, was reversed by this Court, which held that both federal and state court jurisdiction of the claim were pre-empted under Garmon. Nevertheless, Justice Harlan's majority opinion itself specifically stated that if Lockridge had presented claims such as those of Respondents in the case at bar, they would not have been "preempted" by Garmon:

> "The preemption doctrine we apply today is, like any other purposefully administered legal principle, not without exception. Those same considerations that underly Garmon have led this Court to permit the exercise of judicial power over conduct arguably protected or prohibited by the [National Labor Relations] Act where Congress has affirmatively indicated that such power should exist, Smith v. Evening News Association . . .; . . . and where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume

that judicial supervision will not disserve interests promoted by the federal labor statutes, Vaca v. Sipes . . .

In his brief before this Court, respondent has argued for the first time since this lawsuit was started that two of these exceptions to the Garmon principle independently justified the Idaho courts' exercise of jurisdiction over this controversy. First, Lockridge contends that his action, properly viewed, is one to enforce a collective bargaining agreement. Alternatively, he asserts the suit, in essence, was one to redress petitioner's breach of its duty of fair representation. . . ."

-- 403 U.S. at 297-298, 29 L.Ed.2d at 489 [Emphasis added]

Justice Harlan's opinion went on to explain why each of the causes of action pleaded by Respondents' instant complaint are properly within the jurisdiction of the state courts. Because of its

critical importance to the proper disposition of this petition, Respondents must quote the Lockridge opinion at some length. First, as to state court jurisdiction over a suit to enforce a collective agreement under Section 301:

> "In Section 301 of the Taft-Hartley Act, . . . Congress authorized federal courts to exercise jurisdiction over suits brought to enforce collective-bargaining agreements. We have held that such actions are judicially cognizable, even where the conduct alleged was arguably protected or prohibited by the National Labor Relations Act because the history of the enactment of Section 301 reveals that 'Congress deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law".' Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 513, 7 L.Ed.2d 483, 490 (1962). It is firmly established, further, that state courts retain concurrent jurisdiction to adjudicate such

claims, Charles Dowd Box Co., supra, and that individual employees have standing to protect rights conferred upon them by such agreements, Smith v. Evening News, supra; Humphrey v. Moore, 375 U.S. 335, 11 L.Ed.2d 370 (1964).

> . . . We have exempted Section 301 suits from the Garmon principle because of the evident congressional determination that courts should be free to interpret and enforce collective-bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act . . . ."
>
> -- 403 U.S. at 298-300, 29 L.Ed.2d at 490-491.

In other words, if Lockridge's claim against his union for deprivation of employment had been based -- precisely

as are the claims of Respondents in the instant case -- upon the collective agreement between his union and his employer, Section 301 would prevent their "preemption" under Garmon.

As to Respondents' "duty of fair representation" cause of action, Justice Harlan further explained:

> "This Court has further held in Humphrey v. Moore, supra, that Section 301 will support, regardless of otherwise applicable preemption considerations, a suit in the state courts by a union member against his union that seeks to redress union interference with rights conferred on individual employees . . . in the collective-bargaining agreement, where it is proved that such interference constituted a breach of the duty of fair representation. Indeed, in Vaca v. Sipes . . ., we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any

event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement . . . .

. . . This Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the N.L.R.B., to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his

co-workers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not be otherwise regulated by the substantive federal law. And the fact that the doctrine was originally developed and applied by the courts, after passage of the [National Labor Relations] Act, and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight. Vaca v. Sipes, supra, at 180-181, 17 L.Ed.2d at 851, 852. So viewed, the duty of fair representation, properly defined, operates to limit the scope of Garmon where the sheer logic of the preemption principle might otherwise cause it to be extended to a point where its operation might be unjust. Vaca

v. Sipes, supra, at 182-183, 17 L.Ed.2d at 853. . . ."

-- 403 U.S. at 299-301, 29 L.Ed.2d at 490-491.

Since Lockridge had neither pleaded nor proven a case of "arbitrary or bad faith conduct on the part of the union", his action was not one for breach of the duty of fair representation, and could not therefore qualify for this exception to Garmon. 403 U.S. at 299-300, 29 L.Ed.2d at 490-491. In the case at bar, however, Respondents' second cause of action expressly alleges the requisite invidious discrimination against them [R. 6-7], and therefore clearly qualifies for the exception elucidated by Justice Harlan.

Petitioners have not cited a single federal case decided since Lockridge[7/] to

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7/ Petitioners' reliance upon Tyree v. Edwards, 287 F. Supp. 589 (1968), aff'd sub nom. Alaska v. International Union of Operating Engineers, 393 U.S. 405, 21 L.Ed.2d 633 (1969) [Petitioners' Brief, pp. 11-12] is misplaced. That per curiam decision predated, by two years, the Lockridge decision of this Court, wherein both the majority and dissenting justices upheld court jurisdiction over Section 301 (Cont.)

support their contention that the National Labor Relations Board has exclusive jurisdiction over either of the causes of action pleaded in Respondents' Complaint.

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7/ Cont.

and "duty of fair representation" suits. Furthermore, the Tyree case was a decision of a three-judge Federal District Court, holding that a state (Alaska) statute which regulated a union's hiring hall was preempted by Federal legislation. And the result in Tyree may well have been influenced by the fact that the N.L.R.B. affirmatively intervened as amicus curiae before this Court, to assert the exclusivity of its jurisdiction, 21 L.Ed.2d 633; whereas in the case at bar, no official of the National Labor Relations Board has ever sought to intervene herein in behalf of Petitioners' position that N.L.R.B. jurisdiction is "exclusive". In any event, a per curiam summary affirmance by this Court, such as Tyree, is not entitled to the weight of binding precedent herein. Doe v. Hodgson, 478 F.2d 537, 21 WH cases 897 (2d Cir. 1974).

The only post-Lockridge federal case cited by Petitioners to support their attempted evisceration of the duty of fair representation, REW v. International Organization of Masters, Mates & Pilots of America, Inc., 349 F. Supp. 542 (E.D. Pa. 1972) [Petitioners' Brief, pp. 31-33], lends no such support. In that case, a person who had been expelled from defendant union 15 years prior to filing suit attempted to state Section 301 and "duty (Cont.)

Indeed, the overwhelming weight of federal authority since Lockridge establishes concurrent state (and federal) court jurisdiction over both causes of action. Smith v. Sheet Metal Workers Local 25, 500 F.2d 741, 87 LRRM 2211 (5th Cir. 1974); Buzzard v. Local Lodge 1040, IAM, 480 F.2d 35 (9th Cir. 1973); Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, 453 F.2d 1018 (9th Cir. 1972); St. Clair v. Local 515, 422 F.2d 128 (6th Cir. 1969); Brady v. TWA, Inc., 401 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969); see also, Bryson, "A Matter of Wooden Logic: Labor Law Preemption and Individual Rights", 51 Tex.L.Rev. 1037 (1973).

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7/ Cont.

of fair representation" causes of action. The trial court dismissed his complaint, for the sound reasons that (a) it did not involve, in any sense, any collective agreement enforceable under Section 301, and (b) a non-member plaintiff is owed no duty of fair representation by a union. Respondents' imagination is concededly insufficient to grasp the pertinence of such a case to the one at bar.

C. STATE COURT CONCURRENT JURISDICTION OVER "DUTY OF FAIR REPRESENTATION" CASES IS NOT LIMITED TO UNIONS' ARBITRARY REFUSALS TO PROCESS GRIEVANCES

Petitioners argue that Vaca v. Sipes, supra,

> "has been limited to cases where arbitrary or bad faith conduct amounting to unfair representations [sic] during grievance procedures after discharge is shown"
> [Petitioners' Brief, pp. 30, et seq.]

No federal authority, decided before or after Lockridge, supports Petitioners' contention.

A recent Ninth Circuit Court of Appeal "duty of fair representation" case, for example, is directly contra. In Retana v. Apartment, Motel, Hotel and Elevator Operators Union Local No. 14, 453 F.2d 1018 (9th Cir. 1972), the Court of Appeal examined the claims of plaintiff Spanish-speaking members that their union had violated its duty of fair representation (1) by failing to provide bilingual liaison between such members and the

union; (2) by failing to provide them with a copy of the collective bargaining agreement in Spanish; (3) by failing to explain their rights and responsibilities as union members to them; and (4) by failing to seek a bilingual supervisorial system that could assist such union members in the performance of their employment duties:

> "The district court thought the allegations insufficient because they did not 'concern any provision of the collective bargaining agreement.' . . . This places too narrow a construction either upon the union's duty or the allegations of the complaint, or both.
>
> The duty imposed upon a union is broad and demanding. It must 'serve the interests of all members without hostility or discrimination toward any, . . . exercise its discretion with complete good faith and honesty, and . . . avoid arbitrary conduct.' Vaca v. Sipes, 386 U.S. at 177. [n.8:

The Vaca opinion's repeated reference to 'arbitrary' union conduct reflects a calculated broadening of the fair representation standard. Feller, 'Vaca v. Sipes: One Year Later,' in NYU Twenty-First Annual Conference on Labor 141, 167 (1969) . . .]

Moreover, most of the allegations of this complaint 'concern' matters related to the negotiation or administration of the collective bargaining agreement. Such matters are not beyond the duty of fair representation simply because they do not involve the breach of a specific provision of the collective bargaining agreement:

> 'The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective

bargaining is a continuous process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by the contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.' (footnotes omitted and emphasis added). Conley v. Gibson, 355 U.S. at 46."

-- 453 F.2d at 1023-1024.

And in Smith v. Sheet Metal Workers Local 25, 500 F.2d 741, 87 LRRM 2211 (5th Cir. 1974), plaintiffs' hiring hall discrimination claims were specifically held actionable, on a "duty of fair representation" theory, despite the concurrent existence of N.L.R.B. jurisdiction:

"In our judgment, union conduct may be consistent with or even

unrelated to the terms of a collective bargaining agreement and yet violative of the duty of fair representation. [Citations omitted] As the Court recently pointed out in Amalgamated Association of Motorcoach Employees v. Lockridge, 403 U.S. 274, 299 (1971), the Vaca holding goes much further than the district court or the union would urge by bestowing on duty of fair representation suits across-the-board immunity from preemption . . . This suggests additionally that it makes no difference that the complaint alleges union conduct which is arguably prohibited by Section 8 of the Labor-Management Relations Act, 29 U.S.C. §158 . . .

In Vaca, the Supreme Court considered our United Rubber Workers decision [Local Union No. 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (5th Cir. 1966)] and concluded that even on the assumption that a duty of fair representation breach constitutes an

unfair labor practice, in duty of fair representation cases exclusive Board jurisdiction has been discarded in favor of concurrent jurisdiction in the courts. Vaca v. Sipes, 386 U.S. at 178. The Court reached this conclusion because 'it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the N.L.R.B.' in duty of fair representation cases. Id., 386 U.S. at 179. . . ."

-- 87 LRRM at 2213-2214.

## D. NOTHING IN FEDERAL LAW REQUIRES RESPONDENTS TO "EXHAUST" CONCURRENT N.L.R.B. REMEDIES PRIOR TO BRINGING THIS ACTION

Because Respondents' N.L.R.B. and judicial remedies are concurrent, there is no requirement whatsoever that Respondents complete pursuing one before commencing the other. Petitioners have not cited a single case to the effect that union members victimized by their union's breach of a collective agreement's

promise(s) and/or breach of its duty of fair representation must even resort to -- never mind, exhaust -- the processes of the N.L.R.B. prior to instituting a lawsuit on such causes of action. Surely, if that were the law, in the twelve years since the National Labor Relations Board first held that a union's breach of the duty of fair representation constituted a violation of Section 8(b)(1)(A) of the Act, Miranda Fuel Co., 140 NLRB 181 (1962), some court would have elucidated the position now advanced by Petitioners.

None of the cases cited by Petitioners [Petitioners' Brief, pp. 35-36] stand as authority for such a proposition. Smith v. General Truck Drivers Local 467, 181 F. Supp. 14 (S.D. Cal. 1960) merely held that the plaintiffs were bound to exhaust existing intra-union appeals procedures prior to bringing a federal court action to enforce Landrum-Griffin rights -- a prerequisite specified in the statute itself, 29 U.S.C. §411(a)(4). Both Capitol Service v. N.L.R.B., 347 U.S. 501, 98 L.Ed. 887 (1954) and N.L.R.B. v. Nash-Finch Company, 404 U.S. 138, 30 L.Ed.2d 328 (1971) were cases in which the

N.L.R.B. itself obtained federal court injunctions against the application of state court injunctions limiting employee picketing, and the holdings of this Court in both cases were expressly premised on the exclusive jurisdiction of the Board in this field.

Moreover, the policies behind any "exhaustion of administrative remedies" doctrine are not applicable here, and to resort to them would result in depriving Respondents of important substantive rights. Respondent Magallanes filed his unfair labor practice charge in Case No. 31-CB-1066 (upon which Petitioners rely so heavily) on July 27, 1972, and as of this writing, the General Counsel of the National Labor Relations Board has not yet determined whether or not to issue an unfair labor practice complaint, pursuant to Section 102.15 of the Board's Rules and Regulations, 29 CFR §102.15.[8/]

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8/ Respondents' Superior Court Complaint in this case was filed on January 4, 1973, more than five months after Respondents' (second) resort to the N.L.R.B. [R. 1].

If, as Petitioners contend, Respondents were required to await the General Counsel's decision prior to initiating their state court action, they would already have lost all judicial remedies for wrongs suffered during this 30-month delay. In addition, the National Labor Relations Board has no power whatsoever to entertain or dispose of "class action" suits.9/

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9/ Petitioners' assertion that "the Board has the power to grant class action relief" [Petitioners' Brief, p. 31] is belied by the very cases they cite: N.L.R.B. v. Midwest Transfer, 287 F.2d 443 (3d Cir. 1961) involved seven discriminatees, of whom five were specifically named in the unfair labor practice charge. N.L.R.B. v. Local 542, 329 F.2d 512 (3d Cir. 1964) involved three alleged discriminatees, one of whom was ultimately denied backpay. Local 925, Operating Engineers, 168 NLRB 818 (1967) involved one discriminatee. Carpenters Local 180, 175 NLRB 927 (1969) involved three discriminatees.

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the decision of the California Court of Appeal herein was in accord with the applicable decisions of this Court, and the petition for a writ of certiorari should be denied.

Dated: December 23, 1974

NEIL M. HERRING of
FINKEL AND HERRING
A Law Corporation

Attorneys for Respondents